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MALICE AFORETHOUGHT

Not a few of the rules and requirements of our law which are to-day universally received appear so fundamental as to make it difficult for us to believe that time ever was when they were not. The requirement of the element of malice aforethought in the crime of murder is one of these.¹

¹ See the remarks as to the presumption of malice in the recent case of *Coart v. State* (1923, Ga.) 119 S. E. 723, 728.

Actually the necessity of that malice as an essential part of murder is, as our law goes, of comparatively recent origin.² In determining liability for wrongful acts, early English law did not concern itself with either intent or malice.³ For a long time it knew only two classes of homicide, justifiable and unjustifiable; in the first class fell lawful killing by an executioner, and the killing of an outlaw or a thief or a slayer taken red-handed who resisted arrest; in the second class were put all other killings, even those in self-defence or by misadventure.⁴ Of murder in its modern sense as involving malice the law knew nothing under that name; in fact a judgment of murder might be rendered where there had been no slaying at all.⁵ Till 1340 *murdrum* had meant three different things—secret homicide, homicide perpetrated by the

² *Thomas Buckler's Case* (1552, K. B.) 1 Dyer (ed. 1794) 68 b, seems to be the first reported case which definitely declares that murder implies malice aforethought.

³ *Legis enim est: qui inscietur peccat scietur emendet.* 1 Liebermann, *Die Gesetze der Angelsachsen* (1898) 603, *Leges Henrici*, 88 sec. 6, 90 sec. 11; 2 Pollock and Maitland, *History of English Law* (2d ed. 1905) 470; Holmes, *Common Law* (1881) ch. 1; Wigmore, *Responsibility for Tortious Acts* (1894) 7 HARV. L. REV. 321; 3 *Select Essays in Anglo-American Legal History* (1909) 485.

⁴ See 2 Pollock and Maitland, *op. cit. supra* note 3, at p. 479, for numerous actual cases there cited. See also 3 Holdsworth, *History of English Law* (2d ed. 1914) 255-261. Even after pardons for killings in self-defence have become pretty much a matter of course (The Statute of Gloucester [1278] 6 Edw. I, c. 9) the coroner's jury will continue to find that "J. B. feloniously slew J. P. in self-defence at W. with a dagger worth six pence, and fled after committing the felony." (1399) *Select Coroners' Rolls* (9 Seld. Soc. 1895) 96.

⁵ That is, till the murder fine in cases of misadventure was abolished by the Statute of Marlborough (1267) 52 Hen. III, c. 25. In 1198 the jurors of a certain hundred make six presentments before the itinerant justices; in four cases the judgment is murder. The first presentment of the next hundred is also one of murder. We give them in order: (1) "The jurors say that J, son of L, and Alice, daughter of S, were accidentally drowned in the mill pond of E, and Englishry was not duly presented. Murder." (2) "The same say that a certain woman was found dead in the field of E, and it is not known who she was, and no one is under suspicion. Judgment—murder." (3) "The same say that evil doers killed W. S. in his home at S. and bound his son R. and wounded X. and Y. The jurors do not know who they were. Englishry was not presented. Judgment—murder." (4) "A certain man was found slain in the fields of Clahill, and it is not known who he was or who killed him. Judgment—murder." (5) "The jurors say that in the grange of the monks of C. at T. two beggars who were staying there killed a third. Their identity is not known. Judgment—murder." 1 Palgrave, *Rotuli Curiae Regis* (1835) 159. (1) is a clear case of accidental death without any slaying, and (2) probably so. This result was not at all uncommon. See *ibid.* 202 (murder where one died from starvation); and *ibid.* 203 (murder where death resulted from exposure). (3) (4) and (5) are cases of deliberate, intentional killing. In all the cases there was no presentment of Englishry. In all there should have been such a presentment if the hundred was to escape paying the murder fine, but in three of the cases no presentment was possible because the slain persons were unknown. The actual circumstances make each case easily distinguishable from any of the others, but in no instance is the judgment determined by modern standards.

murdrator (which would in all cases be felonious, and in some cases homicide of a particularly heinous nature), and the murder fine.⁶ Whatever may have been the origin of this latter *murdrum*—it is assigned to Cnut on evidence that is none too trustworthy—it was one of the results of the Norman Conquest of England, that when a person was slain and his Englishry (that is, proof in a prescribed manner that he was English) was not presented to the coroner, the district, usually the hundred, became liable for the murder fine.⁷ The size of this fine, the frequency of its occurrence and the consequent burden of payment which became saddled upon the hundreds, all contributed to give to the word *murdrum* the primary meaning of murder fine till that was abolished by (1340) 14 Edw. III, st. 1, c. 4.⁸

⁶ For the connection of *murdrum* with the Teutonic *morth*, see 2 Pollock and Maitland, *op. cit. supra* note 3, at p. 486. The definition of murder as secret killing is found in Glanville, *De Legibus* (circa 1187) XIV 3. Bracton, *De Legibus* (circa 1250) f. 134b, repeats and amplifies Glanville's definition, and then proceeds to discuss Englishry and the murder fine, neither of which is mentioned by Glanville. Cf. Fleta (circa 1290) 46. As early as 1166 the word *murdrator* signified the slayer who together with robbers and thieves became the subject of the new procedure provided for by the Assise of Clarendon (1166) chs. 1, 2, 4, 6, 17; cf. Assise of Northampton (1176) chs. 1, 3; Br. f. 115b, classes *murdratores* with robbers and housebreakers. The use of the word murder as synonymous with slaying of the worst kind stretches over a long period. It is found in the earliest plea rolls. Thus in 1194, "a certain woman was murdered (*murdrata*) at M, and it is not known who did it." 14 Pipe Roll Society (1891) 111; cf. (1194) 1 Palgrave, *Rotuli Curiae Regis*, cited *supra* note 5, at p. 60. In 1200, S. C. appealed T. W. that in felony and in the king's peace and at night and in murder he killed J. C. his father, and pulled out his tongue, and upon his face burned a charter of the king. 2 Palgrave, *Rotuli Curiae Regis*, cited *supra* note 5, at p. 245. For a considerable time after 1340 the word murder continues to be used in the same sense. (1389) "feloniously slew and murdered," Select Coroners' Rolls, cited *supra* note 4, at p. 123; (1392) "feloniously killed and murdered his master," *ibid.* 48; (1488) "feloniously at L murdered," Y. B. 3 Hen. VII (1487) 5 b, pl. 2; (1520) "feloniously slew and murdered." Rogers, *Oxford City Documents* (18 Oxf. Hist. Soc. 1891) 181.

⁷ As to the origin of this *murdrum* see 1 Liebermann, *op. cit. supra* note 3, at p. 642. (*Leges Edwardi*, 16); Stubbs, *Select Charters* (9th ed. 1913) 218 (*Dial. de Scacc.* I. 10); Br. f. 134b-135; 2 Pollock and Maitland, *op. cit. supra* note 3, at p. 487. A very good account of Englishry and the *murdrum* is found in Chadwyck Healey, *Somersetshire Pleas* (11 Som. Rec. Soc. 1897) 58-62. The form in which Englishry should be presented varied in the different counties; it was usually by one, or two, on the side of each parent. *Ibid.* 77-80 gives the custom for each county.

⁸ Originally the fine was 46 marks, *Leges Henrici*, 91. Cf. *Dial. de Scacc.* I. 10 (Stubbs, *op. cit. supra* note 7, at p. 219). As to what was actually paid by all the hundreds in Gloucestershire in 1221, see Maitland, *Pleas of the Crown for County of Gloucester* (1884) 118. Certain counties were free from the *murdrum*, e. g. Cornwall, Shropshire, Yorkshire. Chadwyck Healey, *op. cit. supra* note 7, at pp. 77-80. In parts of Worcestershire there was no *murdrum* beyond the Severn (1221). Maitland, *op. cit. supra*, pl. 105. There may be no *murdrum* on account of war. *Ibid.* pl. 200. By ancient custom there was no murder within the covert

It is consequently not till after 1340 that murder came to mean, in a special sense, homicide with malice aforethought. Up till then, when courts gave a judgment of murder, or when lawyer or layman spoke of murder, what was almost always meant was the murder fine. But this does not mean that in seeking to find the origin of our modern definition of murder we may ignore the period before 1340. Really the problem is two-fold, the idea of the development of malice aforethought as such, and the connection of that element with homicide in order to constitute murder. On the side of malice aforethought it carries us much further back than 1340.

Two writers have already treated this subject of the origin of malice aforethought in some detail.⁹ Stephen believed that the historical answer to the problem was wrapped up in the writ *de odio et atia*.¹⁰ He also pointed out that the first statutory recognition of malice aforethought was to be found in a statute of 1389.¹¹ Maitland believed that he saw the origin of malice aforethought in the old Anglo-Saxon *forsteal* (lying in wait, ambush), which became *agwait purpense* or *assultus premeditatus* in the medieval English law according to whether it was translated into French or Latin.¹²

There can be no doubt that Maitland was correct in insisting upon the intimate historical connection of these three expressions.¹³ But

of Malvern Forest. (1221) 1 Select Pleas of the Crown (1 Seld. Soc. 1887) 82, pl. 128. In 1267, after a famine which caused so many deaths that the murder fine became unbearable, the Statute of Marlborough (1267) 52 Hen. III, c. 25, provided that the fine was no longer to be levied when a death occurred from misadventure.

⁹ 3 Stephen, *History of the Criminal Law of England* (1883) 41 ff; Maitland, *The Early History of Malice Aforethought* (1883) 8 LAW MAG. & REV. 406, 1 *Collected Papers* (1911) 304.

¹⁰ For the writ see 2 Pollock and Maitland, *op. cit. supra* note 3, at pp. 587-88. Stephen's theory as to the connection of this writ with the origin of "malice aforethought" has not been generally accepted. *Ibid.* 469, note 1. His contention that the writ was abolished by the Statute of Gloucester (cited *supra* note 4, c. 9) can hardly be accepted. 2 Pollock and Maitland, *op. cit.* 481, note 1.

¹¹ The statute is found in 3 *Rotuli Parliamentorum*, 268, or in the statute book as Stat. 13 Rich. II, st. 2, c. 1. See note 33, *infra*.

¹² See, for *forsteal*, 1 Liebermann, *op. cit. supra* note 3, II Cnut, 12-15; *Leges Henrici*, 80 secs. 2, 4. For *agwait purpense*, *ibid.* *Leges Wilhelmi*, I. 2. For *assultus premeditatus* (always in the form *in assultu premeditato*) Br. f. 144-144b; 1 Select Pleas of the Crown, cited *supra* note 8, pls. 88, 94; Select Coroners' Rolls, *passim*.

¹³ The recently published (London, 1922) first volume of *Curia Regis Rolls* contains a case from 1200 which still further strengthens the connection. In an appeal of robbery (p. 179) the appellor counted that the appellee "in felony and in premeditated ambush" (*in insidiis premeditatis*) assaulted him on the king's highway. The Latin words italicized are a much closer translation of *agwait purpense* than is the usual *in assultu premeditato*, and the facts as alleged fit the definition of *forsteal* as given in *Leges Henrici*, 80, sec. 2. Mention of the king's highway in connection with premeditated assault (as in *forsteal*) persists, especially in the coroners' findings. See Select Coroners' Rolls, cited *supra* note 4, pls. 18, 21. See also Br. f. 144, in the appeal of wounds.

there is difficulty is seeing any direct relation between them and that malice aforethought which became so essential a part of the murder of later times. At first sight it might appear that the French *purpense* or the Latin *premeditatus* was sufficient to form the connection, more especially as the *malice prepense* (*purpense*) of the later year books was the usual expression to denote malice aforethought till at least as late as Coke's time.¹⁴ As a matter of fact, however, stress should be put upon the lying in wait, or the assault, rather than upon the premeditation. This is certainly true as to *forsteal* from its very definition, and the French expression is acknowledged to be but a translation of *forsteal*; and the early cases show it is true also in regard to *in assultu premeditato*.¹⁵ This latter expression occurs not only in cases of homicide,¹⁶ but also in cases of robbery,¹⁷ mayhem,¹⁸ wounding,¹⁹ and mere assault.²⁰ In the time of the earliest plea rolls its use seems to have been confined to instances of actual premeditated assault or attack; it is invariably used to express a state of fact. The great majority of appeals of felony in which it occurs also contain an allegation of robbery; many of them are out and out cases of robbery. It is significant, too, that a rather exhaustive search of all the early printed material has failed to disclose a single case of homicide in which premeditated assault is alleged, which is not also a case of robbery, or wounding resulting from a planned attack.²¹ Bracton in giving the words of the appeal of homicide includes therein the *in assultu premeditato*; but he inserts the same expression also in the appeal of wounding and of mayhem.²² For the generation or two following Bracton the coroners' rolls reveal the same general situation.²³

¹⁴ Coke uses it in commenting on his definition of murder. 3 Coke, *Institutes* (ed. 1797) 50.

¹⁵ See *supra* notes 12 and 13. Some of the cases omit the *premeditato*. I *Curia Regis Rolls*, 39, 63. The allegation of ambush continues for a long time. Thus as late as 1481, in an appeal brought by a woman for the death of her husband, she counted that defendant lay in wait (*gisait en agait*) to murder her husband, Y. B. 21 Ed. IV, 25, pl. 17.

¹⁶ (1194) 1 Palgrave, *Rotuli Curiae Regis*, 60.

¹⁷ (1203) 1 *Select Pleas of the Crown*, cited *supra* note 8, pl. 88; (1206) *ibid.* pl. 94.

¹⁸ (1225) 3 Bracton's Note Book (Maitland ed. 1887) pl. 1084; (1266) *Select Coroners' Rolls*, cited *supra* note 4, at p. 2.

¹⁹ (1200) I *Curia Regis Rolls*, *supra* note 13, at pp. 209, 246.

²⁰ (1221) 1 *Select Pleas of the Crown*, *supra* note 8, pl. 164, "G. with his force came and intruded into his house against him, and wickedly and in felony and in premeditated assault, assaulted and beat and ill-treated him."

²¹ Of the many appeals of homicide, in (1201-1225) 1 *Select Pleas of the Crown*, cited *supra* note 8, only one, pl. 121, alleges premeditated assault, and then in connection with the wounding from which death resulted considerably later—"they came out of a mill in which they had lain concealed, and in premeditated assault came upon W. and wounded him."

²² Br. f. 138, f. 144, f. 144b; cf. Fleta, 48, 59.

²³ *Select Coroners' Rolls*, *passim*.

All our available evidence points to the same conclusion. The charge of premeditated assault occurs not only in cases of homicide, but also in other crimes of violence, and in cases of slaying only where there is the actual premeditated attack. These crimes were all felonies, and were among the so-called pleas of the crown in which the complainant had specifically to allege felony and breach of the king's peace.²⁴ While it was not necessary to allege premeditated assault, in many cases where the facts would admit of it the appellor, to further strengthen his charge it would seem, did allege it; in doing which he was making—more or less unconsciously we may suppose—a charge of *forsteal* which had been one of the earliest of the pleas of the crown.²⁵ Thus we get the *in assultu premeditato* of the Latin records. Applied to crimes of violence generally under the proper states of fact, it existed as a part of the complaint long before any consideration of malice was either necessary or possible, and it continued so to exist, independently of allegations of malice, long after the question of malice became all important.²⁶

We must look for the origin of malice aforethought in quite another field. Even in the days when liability was so nearly absolute that the courts would pronounce against the one who killed by mischance or in self-defence the same judgment that would be rendered against the most wanton slayer, there was one place in which the question of intent in connection with homicide came to be considered.²⁷ The only way in which the strict letter of the law could be mitigated for those who

²⁴ The fullest treatment of the pleas of the crown for this period will be found in Bracton, f. 115b-159. For actual cases see 1 *Select Pleas of the Crown* (1 Seld. Soc.). For examples from the period of the year books see Fitzherbert, *Abridgement* (circa 1514) tit. *Corone*, or Broke, *Adbridgement* (1568) tit. *Corone*. Standard works are Staunford, *Plees del Coron* (1557); Hale, *Pleas of the Crown* (1763). We get our first view of pleas of the crown from the time of Cnut; they are only five in number, but they include breach of the king's special peace and *forsteal*. See 2 Pollock and Maitland, *op. cit. supra* note 3, at p. 453.

²⁵ Maitland says that the man alleged to be guilty of premeditated assault, is "charged with *forsteal*, *agwait purpense*, *guet-apens*." *I Collected Papers* (1911) 318.

²⁶ The element represented in *forsteal* continues to be alleged in cases of violent slaying. (1390) "X and Y lying in wait feloniously killed W. J." *Select Coroners' Rolls*, cited *supra* note 4, 109-110. The lying in wait or the assault are distinguished from the malice aforethought, as in the statute of 1389 referred to above (and *supra* note 11); so also in 1469 "if a man be indicted that he of malice aforethought and assault killed a man." Y. B. 9 Ed. IV (1469) 26 pl. 35. Even after *Thomas Buckler's Case* (*supra* note 2) has made the meaning of murder very definite, the old forms will still persist though only verbiage. Thus from 1567 we get "murder by lying in wait, assault, and malice prepense and aforethought." *Turner v. Musgrave* (K.B.) 3 Dyer (ed. 1794) 261.

²⁷ As to killing by misadventure and in self-defence in the earlier law, see 2 Pollock and Maitland, *op. cit. supra* note 3, at pp. 483-84.

had innocently slain another was through a royal pardon.²⁸ Before the middle of the thirteenth century it had become a recognized practice for such slayers under judgment of death or outlawry—which entailed also loss of lands and chattels—to pray a pardon of the king. The records of many of these pardons are yet extant. Their language makes it clear that the king, before exercising his prerogative power, would insist upon being assured of the lack of moral guilt on the part of the slayer. On this point he was informed by a jury specially called to determine the matter. In the findings of these juries as given in the pardons we get our earliest use of the expression “malice aforethought.”²⁹ By 1230 at the latest the pardons are making use of that expression in the sense in which it came to be used at a later time.³⁰ By far the larger number of early pardons are concerned with cases of misadventure; generally they will recite that A killed B “by misadventure and not by felony and malice aforethought,”³¹ though felony will not be mentioned in some of them.³²

Unlike “*in assultu premeditato*” in appeals of felony, the reference to malice aforethought apparently never occurs in the earlier pardons except in cases of homicide; but in that connection it becomes so fixed, that in the official register of writs, which comes to be printed in 1687, the writs of pardon for excusable killings will still say, “by misadventure (in self-defence) and not by felony or malice aforethought.”³³

²⁸ This was strictly a use of the prerogative power of the king, not a matter of law. “The king moved by pity pardoned him the death.” (1212) 1 Select Pleas of the Crown, cited *supra* note 8, pl. 114; “The king by his grace and not by judgment has granted him pardon for that death.” (1236) Bracton’s Note Book, *supra* note 18, pl. 1216. Even the Statute of Gloucester (cited *supra* note 4) made no further provision for the slayer who killed in self-defence or by mischance than that “the king shall take him to his grace if it pleases him.” See 3 Holdsworth, *op. cit. supra* note 4, 257-58.

²⁹ We cannot here go into the question as to why this matter of intent should be taken into consideration by these special inquests at a time when it was still being ignored by the courts. It may have been due to ecclesiastical influence. See 2 Pollock and Maitland, *op. cit. supra* note 3, at p. 476. The substantial pecuniary consideration which accompanied the prayer for a pardon presumably had at least as much to do with the granting of pardons for innocent killing as any high motive on the king’s part.

³⁰ (1230) Patent Rolls, 14 Hen. III, 393. The writ, addressed to all the king’s bailiffs, reads: “Because—by an inquest which we caused to be made to determine whether R. P. killed B. P. knowingly and deliberately and with malice aforethought, or unwittingly and by misadventure—we have learned that he did not do this knowingly and willingly, but unwittingly and by misadventure”

³¹ (1243) 1 Rôles Gascons, no. 911; *ibid.* no. 973.

³² (1254) 1 Rôles Gascons, no. 3983; (1231) Patent Rolls, 16 Hen. III, 456. We have found no references to self-defence, as contrasted with misadventure, in the earliest pardons; seemingly self-defence is made a ground of pardon somewhat later than misadventure. An interesting pardon of Edward I for slaying in self-defence, “and not feloniously or of malice aforethought,” will be found in (1313) 1 Y. B. 6 and 7 Edw. II (24 Sel. Soc. 1909) 139.

³³ *Registrum Brevium Originalium*, ff. 287, 309. It is interesting to note in this connection that the act of 1389 (*supra* note 11), which seemed so important to both Stephen and Maitland, is concerned solely with pardons.

For a long time the charters of pardon alone make mention of malice aforethought.³⁴ Many such pardons were granted, with the result that the meaning and connotation of malice became familiar. So we are not surprised when in 1270, after a brawl in which a person is wounded, we see the offending party made to swear, with fifty compurgators, that the affair had been the result of sudden anger and not of malice aforethought.³⁵ In 1306, in a local (hundred) court, a plaintiff alleges that defendant uttered a slander with malice aforethought.³⁶ From the cases of 1330 we have three instances of homicide where the jurors say that the killing was done in self-defence, and not by felony and malice aforethought.³⁷ Later, in 1356, a coroner's jury say on their oath that, "Thomas met the said Maud, and with malice aforethought took her staff from her hand and struck her many blows, so that she fell to the ground and raised the hue and cry against the said Thomas."³⁸ In 1389 the jurors of two townships present that A went to the house of B and by reason of an ancient grudge, premeditating the said B's death (*pro antiqua ira precogitando mortem*) struck him with a sword and caused his death.³⁹ Two years later a coroner's jury say that A and B with malice aforethought lay in wait (*ex malicia precogitata incidiverunt*) for X at N and there feloniously murdered (*murdraverunt*) and killed him.⁴⁰ This case is important. It is the first instance that has been found of malice aforethought being applied to the lying in wait, the old *forsteal* in which Maitland would find the origin of this element. Yet for over one hundred and fifty years the pardons have consistently been applying the test of malice aforethought to distinguish killing by mischance from killing with intent to kill. Notice also the use of *murdraverunt* in the old sense.⁴¹ Two points are clear from this case,

³⁴ From the evidence of the printed material it would seem to be about forty years, considerably more than a medieval generation.

³⁵ "Non ex praecogitata malitia . . . sed ex motu iracundiae nimis accensae." T. Wykes, IV *Annales Monastici* (Rolls Series) 234-35. This was eight years before the statute of Gloucester, *supra* note 4, reformed the procedure in regard to cases of excusable homicide looking toward pardons.

³⁶ 2 Pollock and Maitland, *op. cit. supra* note 3, at p. 538, note 5 (citing an unprinted court roll).

³⁷ Fitzherbert, *Corone*, cited *supra* note 24, pls. 284, 286, 287. The language as to malice is that of the pardons of one hundred years earlier. The prisoners were remitted to prison to await the king's grace, i. e. pardon.

³⁸ Select Coroners' Rolls, *op. cit. supra* note 4, at p. 102. Should the part played by the jury in extending the idea of "malice aforethought" be emphasized? We have as yet had no case of an appeal of felony in which the expression is used, but we have seen three types of jury making use of it—the jury to whom the king before granting a pardon put the question of misadventure (*supra* note 30), the jury that tries the indicted person (*supra* note 37), and the coroner's jury.

³⁹ Select Coroners' Rolls, cited *supra* note 4, at p. 100. This is a clear case of an expression of malice aforethought in connection with killing, though not in the usual words.

⁴⁰ Select Coroners' Rolls, cited *supra* note 4, 124.

⁴¹ *Supra* note 6.

that murder has not yet come to mean only and always killing with malice aforethought, and also that the allegation of such malice may be coupled with the ambush as an act by itself.⁴² In 1403-04, in response to a prayer of the commons that malefactors who tear out both eyes or cut off the tongue be held for felony, the king replied that he granted the prayer, provided it be found that the deed was done *par malice purpense*.⁴³ That is, at the beginning of the fifteenth century the presence of malice aforethought is the fact which determines that certain acts of violence, which stop short of homicide, are felonies. Just before the middle of that century we find a case in point with a decidedly modern flavor. In 1440 a servant is said to have killed his former master, after leaving his service, because of malice aforethought engendered while he was yet in that service.⁴⁴ Within the generation which followed, it seems to have become the custom to indict a man for murder with malice aforethought. Such certainly appears to have been the practice referred to in a case from 1469, which informs us that if a man be indicted that he of malice aforethought and assault killed a man, his charter of pardon will not be allowed by the court unless it expressly makes mention of murder.⁴⁵

But it is not necessary to proceed further with the cases. Before the fifteenth century is out we get the first of a series of statutes, which, passed for the purpose of making murder an offense without benefit of clergy, so emphasize the element of malice aforethought that its relation to the crime is made perfectly clear.⁴⁶

CONSTRUCTIVE CONTEMPT IN THE FEDERAL COURTS

The power of the courts summarily to punish their critics, curbing as it does the liberty of the press and freedom of speech, has been fruitful of controversy. Contempt of court by a publication tending to obstruct the administration of justice in a pending proceeding¹ is in the nature of a criminal act, and when committed out of the presence of the court, is classed as "constructive" contempt.² But after the final disposition of

⁴² Cf. the charge of malice in cases noted above—wounds, *supra* note 35; slander, *supra* note 36; beating, *supra* note 38.

⁴³ 3 *Rotuli Parliamentorum*, 541.

⁴⁴ Y. B. 19 Hen. VI (1431) 47, pl. 102.

⁴⁵ Y. B. 9 Edw. IV (1469) 26, pl. 35.

⁴⁶ (1496) 12 Hen. VII, c. 7; (1512) 4 Hen. VIII, c. 2; (1531) 23 Hen. VIII, c. 1, secs. 3, 4; (1547) 1 Edw. VI, c. 12, sec. 10. See 3 Stephen, *op. cit. supra* note 9, at p. 44.

¹ *Toledo Newspaper Co. v. United States* (1918) 247 U. S. 402, 38 Sup. Ct. 560; *Patterson v. Colorado* (1907) 205 U. S. 454, 27 Sup. Ct. 556; Rapalje, *Contempts* (1884) sec. 56; 1 Bailey, *Habeas Corpus* (1913) sec. 63; 3 Ann. Cas. 763, note.

² Contempts of court are classified according to their character as civil and criminal; according to the place in which they occur as direct and constructive. Civil

a case, the press and public may freely criticize the decisions of the court.³ Prior to the eighteenth century, a libel on a court by one other than an officer of the law was punished only after the usual trial by jury.⁴ In a case decided in 1765, based upon a misconception of earlier decisions, such an offense was held to be punishable in a summary proceeding.⁵ Subsequent cases propagated the error and it is now said, almost universally, that the power so to punish even constructive contempt inheres in all courts of record.⁶ Since the lower federal courts are creatures of Congress, however, their powers are subject to limitation by legislative enactment.⁷ In 1831 Congress passed an act declaratory of the law concerning contempt of court,⁸ which provides that, "The said courts [of the United States] shall have the power to punish by fine or imprisonment, at the discretion of the court, contempts of their authority. PROVIDED that such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice. . . ." The question of the legislative intent in passing the act has often been in issue.

In the much-discussed case of *Craig v. Hecht* (1923, U. S.) 44 Sup. Ct. 103, an information was filed against the petitioner, comptroller of the City of New York, charging him with contempt of court. It was alleged that the petitioner had published a letter in which he falsely asserted that the district judge had adopted the policy of denying public officials access to the original sources of information concerning the

contempt consists of a failure to carry out an order of the court issued in a civil suit for the benefit of the opposing party; suit is brought in the name of the party and the ultimate object is remedial. Criminal contempt is an act committed against the majesty of the court as an agency of the government; suit is brought in the name of the state to punish the offender. Direct contempt is an insult to the court or resistance of its authority committed in its presence. Constructive contempt is an act done not in the presence of the court, but at a distance, which tends to obstruct the administration of justice. Beale, *Contempt of Court, Criminal and Civil* (1908) 21 HARV. L. REV. 161; Palmer, *Constructive Contempt* (1916) 50 AM. L. REV. 368; see *Gompers v. United States* (1914) 233 U. S. 604, 34 Sup. Ct. 693; Ann. Cas. 1915 D, 1048, note; (1923) 32 YALE LAW JOURNAL, 843.

³ See *Patterson v. Colorado*, *supra* note 1, at p. 463, 27 Sup. Ct. at p. 558.

⁴ See an exhaustive treatment by Fox, *The King v. Almon* (1908) 24 L. QUART. REV. 184, 266; 3 Holdsworth, *A History of English Law* (3d ed. 1923) 391-394.

⁵ *Rex v. Almon* (1765, K. B.) Wilmot's Notes, 243; Fox, *The Summary Process to Punish Contempt* (1909) 25 L. QUART. REV. 238.

⁶ *Hollingsworth v. Duane* (1801, C. C. Pa.) Fed. Cas. No. 6,616; *State v. Frew* (1884) 24 W. Va. 416, 457; 1 Bailey, *supra* note 1, secs. 64, 65.

⁷ *Ex parte Robinson* (1873, U. S.) 19 Wall. 505. The court expressed opinion, no doubt correct, that the powers of the constitutionally created Supreme Court are not subject to restriction by Congress. See *United States v. Shipp* (1906) 203 U. S. 563, 27 Sup. Ct. 165; *In re Perkins* (1900, E. D. N. C.) 100 Fed. 950.

⁸ Act of March 2, 1831, U. S. Rev. Sts. 1878, sec. 725 at p. 137, rewritten into the Act of March 3, 1911 (36 Stat. at L. 1163).

affairs of public utility corporations in bankruptcy proceedings pending in the district court. The letter was published following a decision by the judge against the appointment of the petitioner as co-receiver in bankruptcy.⁹ A demurrer to the information was overruled by the district judge and, after a hearing, the petitioner was sentenced for contempt. He immediately sought *habeas corpus* from a circuit judge who, exercising the power of a district court, granted the writ. The Supreme Court, affirming the circuit court of appeals, held that the granting of *habeas corpus* was error since the district court had acted within its jurisdiction.¹⁰ Justices Holmes and Brandeis dissented.

The case fell within the general rule that in a proceeding of *habeas corpus* only jurisdictional questions, and not errors in the decision, are subject to review.¹¹ The effect of the Act of 1831 was thus in issue. From the historical setting of the statute, an inference may be drawn, by no means conclusive, that Congress intended to declare the common law.¹² However, the language used, "except misbehavior . . . in their presence, or so near thereto as to obstruct" strongly implies a limitation. But whatever the legislative intent, the legal effect of the enactment must be as subsequent judicial decisions have defined it. The first case in which the statute was launched upon a sinuous course through the courts held that the judges were "disarmed" of their power

⁹ The view has been expressed, that since the court had rendered its decision on the appointment of a co-receiver, the letter related to a past decision and so was not an act of contempt. *Ex parte Craig* (1921, C. J. 2d) 274 Fed. 177, 187; *Ex parte Craig* (1922, C. C. A. 2d) 282 Fed. 138, 159.

¹⁰ The lower court decisions appear in *United States v. Craig* (1920, S. D. N. Y.) 266 Fed. 230; *Ex parte Craig* (1921, C. J. 2d) 274 Fed. 177; *United States v. Craig* (1921, S. D. N. Y.) 279 Fed. 900; *Ex parte Craig* (1922, C. C. A. 2d) 282 Fed. 138.

¹¹ *Glasgow v. Moyer* (1912) 225 U. S. 420, 32 Sup. Ct. 753; 1 Bailey, *op. cit.* *supra* note 1, sec. 71; see also Jenks, *The Story of the Habeas Corpus* (1902) 18 L. QUART. REV. 64. It has been argued, however, that the *Craig* case should be treated as an exception to this rule since the petitioner was the chief financial officer of a large city, and his absence from duty was a matter of public concern. See dissenting opinion of Justice Hand in *Ex parte Craig* (1922, C. C. A. 2d) 282 Fed. 138, 158.

¹² The Act of 1831 was passed after the impeachment and acquittal in Congress of Judge Peck who had summarily punished an editor for publishing an article referring to a case that had terminated. 7 Gale's and Seaton's *Register of Debates in Congress* (1830-1) 42. After the acquittal of Judge Peck it was resolved that the committee on the Judiciary be directed to inquire into the expediency of defining by statute all offenses which might be punished as contempt by the courts. Mr. Draper, introducing the resolution, indicated a desire to find out the law rather than to change it; he said, ". . . we shall have no difficulty in defining what are not contempts . . . the law ought to be so clear that every individual may be able to look to the statute book, and know whether, in anything that he may do he acts within the law or not." 7 Gale's and Seaton's, *op. cit.* 560-561. Mr. Buchanan, one of the prosecutors of Judge Peck, framed the act and it was passed without debate.

summarily to punish libels upon parties to the suit.¹³ "So near thereto as to obstruct" was deemed to impose a spatial rather than a causal curtailment; an act was no longer contempt unless committed in the presence or proximity of the court.¹⁴ This interpretation was kept alive by numerous *dicta* in subsequent cases.¹⁵ But hard cases involving other sorts of constructive contempt arose, and the courts reacted from a construction imposing so narrow a limitation. Tampering with witness or juror in the hallway of the courthouse,¹⁶ on the street within its vicinity¹⁷ or even in the same city¹⁸ was held to be contempt within the statute. An assault upon a judicial officer,¹⁹ the service of summons upon a privileged witness²⁰ and the preparation of false affidavits,²¹ all at a distance from the court, were summarily dealt with. In such cases the criterion was said to be the direct tendency of an act to obstruct the administration of justice and not its physical propinquity to the court.²²

It seems still to have been thought, no doubt because of the circumstances which occasioned the passage of the act, that a newspaper criticism was immune.²³ However, when the question was presented to the Supreme Court in the *Toledo Newspaper* case,²⁴ continuous attacks

¹³ *Ex parte Poulson* (1835, C. C. E. D. Pa.) Fed. Cas. No. 11,350.

¹⁴ The court said in *Ex parte Poulson*, *supra* note 13, at p. 1208, "Disorder may be repressed in their presence on hearing in a summary manner, but after an adjournment, no attachment can be issued for anything done out of court, during the intermission of its actual session."

¹⁵ *Ex parte Bradley* (1868, U. S.) 7 Wall. 364, 372; *Ex parte Robinson*, *supra* note 7, at p. 511; *In re May* (1880, E. D. Mich.) 1 Fed. 737, 743; *Ex parte Schulenburg* (1885, C. C. E. D. Mich.) 25 Fed. 211, 213; *Morse v. Montana Oregon Purchasing Co.* (1900, C. C. D. Mont.) 105 Fed. 337, 347. In *Hillmon v. Mutual Life Ins. Co.* (1897, C. C. 1st Div. Kan.) 79 Fed. 749, the writing of a letter out of court was held not to be punishable as contempt.

¹⁶ *Ex parte Savin* (1889) 131 U. S. 267, 9 Sup. Ct. 699.

¹⁷ *In re Brule* (1895, D. Nev.) 71 Fed. 943; *United States v. Carrol* (1906, D. Mont.) 147 Fed. 947. But the taking of a deposition in another state in order to impose a fraud upon the court is not so "near thereto as to obstruct." *Doniphan v. Lehman* (1902, C. C. D. Ind.) 179 Fed. 173.

¹⁸ *Kirk v. United States* (1911, C. C. A. 9th) 192 Fed. 273; *McCaully v. United States* (1905) 25 App. D. C. 404.

¹⁹ *Ex parte McLeod* (1903, N. D. Ala.) 120 Fed. 130.

²⁰ *United States v. Zavelo* (1910, C. C. N. D. Ala.) 177 Fed. 536.

²¹ See *In re Steiner* (1912, S. D. N. Y.) 195 Fed. 299. But a misstatement of the effect of a decision is not contempt within the statute. *Asbestos Co. v. John Manville Co.* (1911, C. C. S. D. N. Y.) 189 Fed. 611.

²² See *United States v. Anonymous* (1884, C. C. W. D. Tenn.) 21 Fed. 761, 769; *United States v. Huff* (1913, S. D. Ga.) 206 Fed. 700, 705 (letter to the judge while case was pending).

²³ In *Cuyler v. Atlantic & N. C. R. R.* (1904, C. C. E. D. N. C.) 131 Fed. 95, under facts very similar to the *Craig* case the petitioner was discharged on *habeas corpus*. See also *Kirk v. United States*, *supra* note 18, at p. 277; *Ex parte McLeod*, *supra* note 19, at p. 137.

²⁴ *Toledo Newspaper Co. v. United States*, *supra* note 1, at p. 419, 38 Sup. Ct. at p. 564. The court said, "The test, therefore, is the character of the act done

upon a district judge, published in the same city in which he was sitting, tending to provoke public resistance to an order of the court and attempting to influence the judge in deciding the matter before him, were held (Holmes and Brandeis *dissenting*) to constitute contempt. Chief Justice White, in delivering the opinion, said of the statute in question that "the provision conferred no power not already granted, and imposed no limitation not already existing." Since the *Craig* case was raised on *habeas corpus*, the court was not called upon to decide whether the conduct constituted contempt.²⁵ However if conduct is plainly such that no right-minded judge could regard it as contempt, then the lower court is deemed to have acted "in excess of its powers" and *habeas corpus* will lie.²⁶ In the opinion of the minority the facts of the *Craig* case fell within the latter category.²⁷

The variance of opinion is due, in part, to variance in the convictions of the individual judge as to what is socially expedient.²⁸ Criticism of

and its direct tendency to prevent and obstruct the discharge of judicial duty." Strong *dicta* to the same effect appear in *In re Independent Publishing Co.* (1917, C. C. A. 9th) 240 Fed. 849 (the jury, having read the newspaper comments, was discharged) and in *United States v. Providence Tribune Co.* (1917, D. R. I.) 241 Fed. 524 (publications disclosing secret investigations of grand jury).

²⁵ It has often been said, however, that this question is jurisdictional. *In re Wood* (1890) 82 Mich. 75, 45 N. W. 1113; Bailey, *op. cit. supra* note 1, at p. 270; Talbert, *Contempt Proceedings and Habeas Corpus* (1912) 46 AM. L. REV. 838, 851. In *Ex parte Savin*, *supra* note 16, and *Ex parte Cuddy* (1889) 131 U. S. 280, 9 Sup. Ct. 703, the facts were examined, although the writ was denied on the ground that the conduct of the petitioner did, in law, constitute contempt.

²⁶ In *Ex parte Hudgins* (1919) 249 U. S. 378, 39 Sup. Ct. 337, the petitioner was discharged where the alleged misconduct for which he was committed constituted an act of perjury, and not of contempt. See (1918) 28 YALE LAW JOURNAL, 826. And in *Elliott v. United States* (1904) 23 App. D. C. 456, a writ of *habeas corpus* was granted to one who was sentenced for refusing to testify concerning a communication that was privileged after the court examined the record and passed on the question of privilege. In *Ex parte Ayres* (1887) 123 U. S. 443, 8 Sup. Ct. 164, inquiry was made as to whether the lower court had authority to issue the order, disobedience of which was the alleged act of contempt.

²⁷ The dissenting opinion reasons, with the characteristic forcefulness of Justice Holmes, that the statute limits the jurisdiction of the judge "to cases where his personal action is necessary to enable him to go on with his work," that here there was no matter pending to make this sort of contempt possible, and even if there had been, the acts committed could not possibly obstruct the administration of justice. And in the dissenting opinion in the *Toledo Newspaper* case, *supra* note 1, at p. 424, 38 Sup. Ct. at p. 565, it is said: "A judge of the United States is expected to be a man of ordinary firmness of character, and I find it impossible to believe that such a judge could have found in anything that was printed even a tendency to prevent his performing his sworn duty." Judge Manton, in *Ex parte Craig* (1921) 274 Fed. 177, at p. 186, said to the same effect, "By no interpretation can the letter be said to have any tendency to embarrass or influence the court . . ."

²⁸ Cardozo, *The Nature of the Judicial Process* (1921) 71; Pound, "Courts and Legislation," 9 *Modern Legal Philosophy Series* (1917) 223.

a pending proceeding is conceived to obstruct the administration of justice either by belittling the court in the eyes of the populace or by creating an atmosphere of prejudice inimical to impartial decision.²⁹ Ought not the power to punish by summary proceedings, in which the court acts as prosecutor, judge and jury, be confined to acts which present an immediate obstruction? In both the *Toledo Newspaper* case and the *Craig* case the summary proceedings were instituted after a final decision, presumed impartial, had been rendered. The efficacy of such action as a means of vindicating the dignity of a court may well be questioned. If the purpose be to prevent repetition in future cases it is purely penal in character, and in conformity to a deep-rooted principle in our law, the accused ought to be accorded a trial by jury.³⁰ The judge has his remedy in an action of libel for damages.³¹ It is urged that the power of the courts to inflict summary punishment is "an indispensable means of self-preservation."³² The president performs executive functions without it. Congress cannot commit those who criticize its actions while in session.³³ The Interstate Commerce Commission³⁴ and the subordinate tribunals³⁵ survive without the power to inflict summary punishment. And the Probate Courts may punish only the limited number of acts enumerated in enabling statutes.³⁶ An objection to which Chief Justice Taft is sensible³⁷ is the "delicacy in a judge's deciding whether an attack upon his own judicial action is mere criticism or real obstruction, and the possibility that impulse may incline his view to personal vindication. . . ." A similar delicacy exists in the reluctance of a reviewing court, unconsciously sympathetic, to reverse a commitment, and so disparage the dignity which the lower court sought to defend.

THE WIFE'S INTEREST IN COMMUNITY PROPERTY

The doctrine of community property¹ was inherited by some of our southwestern states from the civil law, but in others it is an exotic

²⁹ Bailey, *op. cit. supra* note 1, sec. 63.

³⁰ The Act of Oct. 15, 1914 (38 Stat. at L. 738, 739) provides that the accused may in all cases not covered by the Act of 1831, demand a trial by jury.

³¹ See *People v. Gilbert* (1917) 281 Ill. 619, 628, 118 N. Y. 196, 199.

³² Bailey, *loc. cit. supra* note 29; *In re Chadwick* (1896) 109 Mich. 588, 67 N. W. 1071.

³³ *Marshall v. Gordon* (1917) 243 U. S. 521, 37 Sup. Ct. 448 (one committed by the House for publishing defamatory and insulting letters released on *habeas corpus*).

³⁴ *Interstate Commerce Commission v. Brimson* (1894) 154 U. S. 447, 14 Sup. Ct. 1125.

³⁵ *United States v. Beavers* (1903, S. D. N. Y.) 125 Fed. 778.

³⁶ Rapalje, *op. cit. supra* note 1, sec. 5; *In re Merrill* (1917) 88 N. J. Eq. 261, 102 Atl. 400.

³⁷ *Craig v. Hecht*, 44 Sup. Ct. at p. 107.

¹ In general, statutes define the separate property of the husband or wife as

introduced by statute.² It now exists in eight states,³ and is everywhere governed by statute. Probably no one of the states still follows the civil law as to the wife's interest.⁴

The interests of the husband and the wife in the community property during the marriage have been described variously by the courts. In California it is said that the wife's interest is an expectancy and the husband is the sole owner;⁵ in Louisiana that the wife has an inchoate right only⁶ and the husband owns the property;⁷ but in Texas that the beneficial interests of the husband and wife are equal,⁸ and in Washington that the proprietary interests of the husband and wife are equal and unified.⁹ In the other four states the courts say that the wife's interest during marriage is not an expectancy but a present vested interest equal to that of her husband.¹⁰

all property owned by him or her before marriage and that acquired afterwards by gift, bequest, devise or descent, with the rents, issues and profits thereof. Community property is all other property acquired after marriage by either husband or wife. Estates by curtesy and in dower are inconsistent with the community property system, and in some states are expressly prohibited. Idaho Comp. Sts. 1919, ch. 184, sec. 4668.

² "The law of community property seems to have originated among the early German tribes (being known as the law of *Gananciales*), being unwritten and brought into Spain by the Visigoths, and first reduced to writing in the Code of Euric or Tolosa (466-484 A. D.). It became the law of Mexico with the coming of the Spaniards in 1521, and the following years, and after the treaty of Guadalupe Hidalgo, inherited as the law of California, with such changes as were deemed advisable." *Nixon v. Brown* (1923, Nev.) 214 Pac. 524, 527. See also *Packard v. Arellanes* (1861) 17 Calif. 525; *Guice v. Lawrence* (1847) 2 La. Ann. 226; *Reade v. De Lea* (1908) 14 N. M. 442, 95 Pac. 131. It is a foreign introduction in Idaho and Washington. See McKay, *Community Property* (1910) 37.

³ The community property system is found in Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas and Washington.

⁴ "The rule of the Spanish law on that subject, [the wife's interest during marriage] is laid down by Febrero with his usual precision: The ownership of the wife, says that author, is revocable and fictitious during marriage. As long as the husband lives and the marriage is not dissolved, the wife must not say that she has *gananciales*, nor is she to prevent the husband from using them, under the pretext that the law gives her one-half. But, *soluto matrimonio*, she becomes irrevocably the owner of one undivided half, in the manner provided by law for ordinary joint ownership." *Guice v. Lawrence*, *supra* note 2, at p. 228.

⁵ *Packard v. Arellanes*, *supra* note 2; *contra: Beard v. Knox* (1855) 5 Calif. 252.

⁶ *Succession of Boyer* (1884) 36 La. Ann. 506, overruling *Dixon v. Dixon* (1832) 4 La. 188.

⁷ *Peck v. Board of Directors* (1915) 137 La. 334, 68 So. 629.

⁸ *Burnham v. Hardy Oil Co.* (1917) 108 Tex. 555, 195 S. W. 1139.

⁹ "In it, [legal community] the proprietary interests of husband and wife are equal, and those interests do not seem to be united merely, but unified; not mixed or blent but identified" *Holyoke v. Jackson* (1882) 3 Wash. T. 235, 239, 3 Pac. 841, 842. See *Marston v. Rue* (1916) 92 Wash. 129, 159 Pac. 111.

¹⁰ *La Tourette v. La Tourette* (1914) 15 Ariz. 200, 137 Pac. 426; *Ewald v. Hufton* (1918) 31 Idaho, 373, 173 Pac. 247; *Peterson v. Peterson* (1922) 35

In determining the rights of the parties each state court has, more or less consistently, followed a theory of its own as to the nature of the institution;¹¹ but since in some instances the terms of the statutes of these jurisdictions are not wholly consistent with the theories of their courts, the significance of the judicial descriptions of the wife's interest and the theory followed is somewhat uncertain. It seems more important to scrutinize the particular statutes and the broad or narrow interpretation given them by the courts. For example, according to the California theory of sole ownership in the husband, he should be able to convey the community real estate alone, to make a gift of the personal property without his wife's consent, and an inheritance tax should be charged on the half of the community property which the wife takes on the death of her husband; but all of these seem to be forbidden by the terms of the statutes.¹² Under the Washington theory of equal proprietary interests a conveyance of the community realty by the husband to a bona fide purchaser should not pass the wife's interest; yet by statute such a transfer by the one having the record title passes a good title.¹³

The development of the community property system in California has been somewhat different from that in the other states, as is clearly shown in the recent case of *Roberts v. Wehmeyer* (1923, Calif.) 218 Pac. 22; and without doubt the wife is less advantageously treated in that state. The absence of a statute allowing the wife a testamentary disposition of half of the community property¹⁴ and the narrow construction given to existing statutes are responsible for this. Thus it is said that a gift of the community property by the husband is not

Idaho, 470, 207 Pac. 425, overruling *Hall v. Johns* (1909) 17 Idaho, 224, 105 Pac. 71; *In re Williams' Estate* (1916) 40 Nev. 241, 161 Pac. 741; *Nixon v. Brown*, *supra* note 2; *Beals v. Ares* (1919) 25 N. M. 459, 185 Pac. 780, overruling *Reade v. De Lea*, *supra* note 2.

¹¹ Professor Evans has shown that there are four theories regarding the nature of the ownership of community property. He has called these the California or single ownership theory, the Idaho or double ownership theory (including in this Arizona, Nevada and New Mexico), the Texas or trust theory (probably including Louisiana), and the Washington or entity theory. Evans, *The Ownership of Community Property* (1921) 35 HARV. L. REV. 47.

¹² Calif. Sts. 1917, ch. 583, sec. 2 (wife required to join in a conveyance of the community realty); *ibid.* sec. 1 (husband forbidden to make a gift of community personal property without consent of the wife); *ibid.* ch. 589, sec. 1 (inheritance tax law not to apply to the half of the community property taken by wife on death of husband). Prior to this statute the surviving wife's share of the community property was subject to an inheritance tax. *In re Moffitt's Estate* (1908) 153 Calif. 359, 95 Pac. 653.

¹³ Wash. Comp. Sts. 1922, sec. 10577. See *infra* note 24.

¹⁴ In 1919 in California a law giving the wife the same right as the husband to dispose of her one-half of the community property by will, was passed by the Legislature, signed by the Governor and then upon a referendum was defeated at the polls on November 2, 1920. See Reiter, *Community Property as Between Husband and Wife* (1922) 19 OHIO L. BULL. (N. S.) 669.

void but vests the property in the donee subject only to the wife's power to revoke the gift and have it reinstated as community property under the control of the husband;¹⁵ that during the marriage the wife cannot maintain an action based on fraud to set aside a sale or mortgage of the community property by the husband;¹⁶ and in addition that the husband has such a vested interest in the community property that he cannot be deprived of it without due process of law, so that a statute limiting, even to the extent indicated above, the husband's power to give away the community property without the wife's consent¹⁷ has been held not to apply to community property acquired before its enactment.¹⁸ In the instant case the court held that a statute requiring the wife to join in a deed of community realty¹⁹ did not apply to community property acquired before the statute.

In general, modern statutes give the wife more and more power over the community property. Except in Louisiana,²⁰ she must join in a conveyance of the realty,²¹ though in Texas²² and Nevada²³ this is only

¹⁵ *Spreckels v. Spreckels* (1916) 172 Calif. 775, 158 Pac. 537. It seems that the power of revocation is of little use to the wife, since the husband might immediately give the property away again. See also *Dahne v. Dahne* (1920) 49 Calif. App. 501, 193 Pac. 785. In Washington, consistently with their theory of the wife's interest, the courts allowed the wife to recover during marriage a gift made by the husband without her consent. *Marston v. Rue*, *supra* note 9.

¹⁶ *Johnson v. Johnson* (1917) 33 Calif. App. 93, 164 Pac. 421. The decisions to this effect are before the requirement that the wife join in a conveyance of the community real property but after the wife's written consent to such a conveyance was required. Likewise in Louisiana the wife cannot maintain an action during marriage, and her relief for a fraudulent alienation by the husband is by an action against the heirs of the husband to recover her share. *Tourne v. His Creditors* (1834) 6 La. 459; *Tourne v. Tourne* (1836) 9 La. 452. "But if it should be proved that the husband has sold the common property, or otherwise disposed of the same by fraud, to injure his wife, she may have her action against the heirs of her husband, in support of her claim in one-half of the property, on her satisfactorily proving the fraud." La. Rev. Civ. Code, 1912, art. 2404.

¹⁷ Calif. Sts. 1917, ch. 583, sec. 1.

¹⁸ *Spreckels v. Spreckels* (1897) 116 Calif. 339, 48 Pac. 228; *Jacobs v. All Persons* (1910) 12 Calif. App. 163, 106 Pac. 896. In accord is *Reade v. De Lea*, *supra* note 2, but in the theory and reasoning used this case is not in line with most of the New Mexico cases. But see *Scott v. Scott* (1914, Tex. Civ. App.) 170 S. W. 273 (statute taking from husband and giving to wife the control and disposition of her personal earnings held not to impair any vested right of the husband); *Holyoke v. Jackson*, *supra* note 9 (Washington legislature allowed to take power of disposition of community property from husband and confer it upon husband and wife jointly).

¹⁹ Calif. Sts. 1917, ch. 583, sec. 2.

²⁰ La. Rev. Civ. Code, 1912, art. 2404; *Guice v. Lawrence*, *supra* note 2.

²¹ Ariz. Rev. Sts. 1913, secs. 2061 and 3850; Calif. Sts. 1917, ch. 583, sec. 2; Idaho Comp. Sts. 1919, ch. 184, sec. 4666; N. M. Sess. Laws, 1915, ch. 84, sec. 1; Wash. Comp. Sts. 1922, sec. 6893. See *La Tourette v. La Tourette*, *supra* note 10.

²² Tex. Civ. & Cr. Sts. Supp. 1922, art. 4621.

²³ 1 Nev. Rev. Laws, 1912, sec. 2160.

true of a conveyance of the homestead. Apparently a sole conveyance even to a bona fide purchaser is void in Idaho and New Mexico.²⁴ Although the husband has the control and power of disposition of the personal property, he has no power to give it away without the wife's consent,²⁵ at least not in fraud of her.²⁶

In spite of the general tendency, however, strong limitations on the wife's power over the community property still cling. If she predeceases her husband, one-half of the community property is subject to her testamentary disposition in only half of the community property states,—Arizona, Idaho, Louisiana, and Washington;²⁷ also in Nevada when the husband has abandoned her without having grounds for divorce;²⁸ and in New Mexico only the portion which may have been set apart for her by judicial decree.²⁹ In Texas her descendants take one-half,³⁰ but in California, Nevada and New Mexico, under usual

²⁴ *Ewald v. Hufton*, *supra* note 10. "... any transfer or conveyance attempted to be made of the real property of the community by either husband or wife alone shall be void and of no effect." N. M. Sess. Laws, 1915, ch. 84, sec. 1; but in California "the sole lease, contract, mortgage or deed of the husband, holding the record title to community real property, to a lessee, purchaser or encumbrancer, in good faith without knowledge of the marriage relation shall be presumed to be valid; but no action to avoid such instrument shall be commenced after the expiration of one year from the filing for record of such instrument in the recorder's office in the county in which the land is situate." Calif. Sts. 1917, ch. 583, sec. 2. In view of this last provision the California courts would probably now allow the wife during the marriage to bring an action to set aside a transfer of community realty by the husband. See *supra* note 16. *Burnham v. Hardy*, *supra* note 8. "Whenever any person, married or single, having in his or her name the legal title of record to any real estate, shall sell or dispose of the same to an actual bona fide purchaser, a deed of such real estate from the person holding such legal record title to such actual bona fide purchaser shall be sufficient to convey to and vest in such purchaser the full legal and equitable title to such real estate free and clear of any and all claims of any and all persons whatsoever not appearing of record in the auditor's office of the county in which such real estate is situated." Wash. Comp. Sts. 1922, sec. 10577.

²⁵ Calif. Sts. 1917, ch. 583, sec. 1; La. Rev. Civ. Code, 1912, art. 2404 (exception that husband may give away community property for the establishment of the children of the marriage); N. M. Sts. Ann. 1915, ch. 55, sec. 2766; *Ramsey v. Beck* (1922) 151 La. 190, 91 So. 674; *Marston v. Rue*, *supra* note 9.

²⁶ *Gristy v. Hudgens* (1922) 23 Ariz. 339, 203 Pac. 569; *Hall v. Johns*, *supra* note 10; *Nixon v. Brown*, *supra* note 2 (husband may make a voluntary disposition of the community property, reasonable in reference to the whole); *Wright v. Hays* (1853) 10 Tex. 130. But after the wife was abandoned by the husband a gift by her of the community property was good. See *Wright v. Hays*, *supra*.

²⁷ Ariz. Sess. Laws, 1921, ch. 7, sec. 1; Idaho Comp. Sts. 1919, ch. 287, sec. 7803 (her testamentary disposition must be in favor of her children or parents and she can leave only one-half of her share to her parents); La. Rev. Civ. Code, 1912, arts. 915 & 916; Wash. Comp. Sts. 1922, sec. 1342.

²⁸ 1 Nev. Rev. Laws, 1912, sec. 2164.

²⁹ N. M. Sts. Ann. 1915, ch. 29, sec. 1840.

³⁰ Tex. Complete Sts. 1920, art. 2469; *Veramendi v. Hutchins* (1878) 48 Tex. 531.

circumstances all the community property belongs to the husband in case of the wife's prior death.³¹ If the husband predeceases the wife, subject to community debts, she always takes one-half of the community property,³² and no inheritance tax is charged on this half.³³ If her husband does not will away his half and leaves no descendants, she takes it all,³⁴ except in California and New Mexico.³⁵ In general the community property is liable for the separate obligations of the husband³⁶ but not of the wife.³⁷

Since women have obtained equal suffrage and have so extensively entered business, their growing demands for a revision of property laws are inevitable. To meet these demands it has been suggested that the community property system might be adopted in other states.³⁸ But aside from other objections, so long as the husband has the full power of management and control of the community property, so that during her life the wife has no use of it except such as is allowed by her husband, the system will not meet the approval of the women who desire equality with their husbands in property affairs. In the community property states, statutes giving the wife control of her own earnings and those of her minor children³⁹ are tending in the right direction, as are also those transferring the control and management of the com-

³¹ Calif. Civ. Code, 1915, sec. 1401; 1 Nev. Rev. Laws, 1912, sec. 2164; N. M. Sts. Ann. 1915, ch. 29, sec. 1840.

³² Ariz. Sess. Laws, 1921, ch. 7, sec. 1; Calif. Civ. Code, 1915, sec. 1402; Idaho Comp. Sts. 1919, ch. 287, sec. 7803; La. Rev. Civ. Code, 1912, art. 915; 1 Nev. Rev. Laws, 1912, sec. 2165; N. M. Sts. Ann. 1915, ch. 29, sec. 1841; Tex. Complete Sts. 1920, art. 2469; Wash. Comp. Sts. 1922, sec. 1342.

³³ Calif. Sts. 1917, ch. 589, sec. 1; *Blum v. Wardell* (1920, N. D. Calif.) 270 Fed. 309; *Kohny v. Dunbar* (1912) 21 Idaho, 258, 121 Pac. 544; *In re Williams' Estate*, *supra* note 10; *contra* in California before the statute, see *supra* note 12.

³⁴ Ariz. Sess. Laws, 1921, ch. 7, sec. 1; Idaho Comp. Sts. 1919, ch. 287, sec. 7803; La. Rev. Civ. Code, 1912, art. 915; 1 Nev. Rev. Laws, 1912, sec. 2165; Tex. Complete Sts. 1920, art. 2469; Wash. Comp. Sts. 1922, sec. 1342.

³⁵ Calif. Civ. Code, 1915, sec. 1402 (husband's share goes to certain descendants or in same manner as his separate property); N. M. Sts. Ann. 1915, ch. 29, sec. 1841 (one-fourth goes to the wife and the remainder to the children, and further according to the law of descent and distribution).

³⁶ 1 Nev. Rev. Laws, 1912, sec. 2165; N. M. Sts. Ann. 1915, ch. 29, sec. 1841; Tex. Civ. & Cr. Sts. Supp. 1922, art. 4621; *Villescas v. Ariz. Copper Co.* (1919) 20 Ariz. 268, 179 Pac. 963; *Van Maren v. Johnson* (1860) 15 Calif. 308; *Holt v. Empey* (1919) 32 Idaho, 106, 178 Pac. 703; *contra*: *Brotton v. Langert* (1890) 1 Wash. 73, 23 Pac. 688. Evans, *Community Obligations* (1922) 10 CALIF. L. REV. 120; (1923) 32 YALE LAW JOURNAL, 405; *ibid.* 626.

³⁷ Ariz. Rev. Sts. 1913, sec. 3852; N. M. Sts. Ann. 1915, ch. 55, sec. 2765; Tex. Civ. & Cr. Sts. Supp. 1922, art. 4621 (except for necessities); *Travers v. Barrett* (1900) 30 Nev. 402, 97 Pac. 126.

³⁸ Reiter, *loc. cit. supra* note 14.

³⁹ Idaho Comp. Sts. 1919, ch. 184, sec. 4667; Nev. Rev. Laws, 1919, sec. 2160, p. 2183; Tex. Complete Sts. 1920, art. 4622. The Nevada statute includes the earnings of her minor children living with her.

munity property to the wife when she is abandoned by her husband.⁴⁰ Even better is the suggestion found in the first draft of the code commissioners of California providing that, "In cases of fraudulent transfers, gross mismanagement or profligate waste of common property by the husband, the wife may have her action in the proper court, and is upon proper showing, entitled to a judgment—1. Securing to her the entire management and absolute . . . disposition of it . . . ; or, 2. Appointing a trustee to manage it, as the court may direct; or 3. Equitably dividing the property, making the part awarded to each their separate property."⁴¹ The provision was intended to aid the wife who had "no remedy except by divorce or death." Even to-day where the husband is profligate or simply a poor business manager, the wife is still without a remedy. It is too unusual to suggest a system dividing into halves all the property which now comes under the community, including the earnings of both, making one-half the separate property of the husband and the other the separate property of the wife, and giving each the power to control, manage, and dispose of his or her half together with the power of assigning this right to the other or to a trustee?

SERVICE OF PROCESS UPON FOREIGN CORPORATIONS

At common law a corporation could not be sued unless service of summons was made upon its head officer.¹ Such service was conceived to be impossible in the case of foreign corporations, because it was said that the officer dropped his official capacity as soon as he left the state of incorporation.² The centralization of industry and commerce into

* "Whenever the husband is *non compos mentis* or has been convicted of a felony and sentenced to imprisonment for a period of more than one year or has abandoned his wife and family and left . . . his family . . . without support or is an habitual drunkard or for any other reason is incapacitated to manage and administer the community property the wife may present a petition . . . to the . . . court . . . praying that she be substituted for her husband, as the head of said community . . ." N. M. Sts. Ann. 1915, ch. 55, sec. 2767. See *Carothers v. McNese* (1875) 43 Tex. 221. If her husband abandons her the wife can charge the community property for necessities. *Hall v. Johns*, *supra* note 10. The common law rule that where a husband abandons his wife without reasonable cause he is liable for her necessities, is analogous. 1 Schouler, *Marriage, Divorce, Separation and Domestic Relations* (6th ed. 1921) sec. 101.

⁴⁰ Calif. Civ. Code, 1915, note to sec. 172.

¹ See *State v. Western N. C. R. R.* (1883) 89 N. C. 584; *Kansas City R. R. v. Daugherty* (1891) 138 U. S. 298, 11 Sup. Ct. 306.

² *McQueen v. Middletown Mfg. Co.* (1819, N. Y. Sup. Ct.) 16 Johns. 5, 7; *Peckham v. Inhabitants in Haverhill* (1834, Mass.) 16 Pick. 274, 286; *Middlebrooks v. Springfield Ins. Co.* (1841) 14 Conn. 301; *Sullivan v. LaCrosse Co.* (1865) 10 Minn. 386. With respect to natural persons, where a defendant is a resident of the state in which suit is brought, actual or constructive service may

corporate interests and the spread of countless corporate organizations into foreign jurisdictions made a change from this ruling imperative.³ The simplest method of making it possible to bring action against a foreign corporation in a state where it did business was to make it a condition precedent to the privilege of doing business in a foreign state that it should consent to submit to the courts of that state upon service of process on its designated agent or representative in that state.⁴ The next step was the ruling by the United States Supreme Court that a state statute providing for service of process upon foreign corporations impliedly imposed such a condition, and that a judgment obtained against a foreign corporation was valid if the corporation had an agent and was doing business within the state.⁵

confer jurisdiction on the court to adjudicate upon his personal liability, regardless of whether the defendant is within the state. Where he is a non-resident, he must be served personally within the state. *Pennoyer v. Neff* (1877) 95 U. S. 714; (1918) 18 COL. L. REV. 67; (1917) 17 COL. L. REV. 441.

³ The English cases departed from the old ruling by reasoning that if we are to consider corporations as a group constituting a natural unit upon which the state has conferred personality, just as it has upon individuals who are also natural units, then we must allow the corporation the attributes of group unity. One of these is the capacity to be present in several places at once. See *Carron Iron Co. v. Maclaren* (1855) 5 H. L. Cas. 416, followed by *Compagnie Générale v. T. Law & Co.* [1899, H. L.] A. C. 431. For an American case using the same general reasoning see *Marlin v. Trenton Mut. Ins. Co.* (1853, Sup. Ct.) 24 N. J. L. 222.

⁴ Inasmuch as a corporation is not a citizen within the meaning of the comity clause of the federal constitution (art. IV, sec. 2) or within the meaning of the privileges and immunities clause of the fourteenth amendment, a state may exclude it altogether or impose conditions precedent to its doing business within the state provided it is not engaged in interstate commerce and is not a governmental agency. *Paul v. Virginia* (1868, U. S.) 8 Wall. 168; *Anglo-American Provision Co. v. Davis Provision Co.* (1903) 191 U. S. 373, 24 Sup. Ct. 92; Beale, *Foreign Corporations* (1904) secs. 74, 117; Scott, *Jurisdiction over Non-residents doing Business within a State* (1919) 32 HARV. L. REV. 871. It seems from recent cases that the Supreme Court is gradually extending the doctrine that the privileges and immunities clause of the fourteenth amendment only applies to those corporations doing business within the state. *Southern Ry. v. Greene* (1910) 216 U. S. 400, 30 Sup. Ct. 287; *Bethlehem Motors Corp. v. Flynt* (1921) 256 U. S. 421, 41 Sup. Ct. 571; *Kentucky Finance Corp. v. Paramount Auto. Exchange Corp.* (1923, U. S.) 43 Sup. Ct. 636.

⁵ *St. Clair v. Cox* (1883) 106 U. S. 350. This consent theory has been attacked as fallacious on the argument that the true basis for the state power is that when a corporation acts within a foreign state the corporation should be bound by the laws of that state, as in the case of natural persons. Cahill, *Jurisdiction over Foreign Corporations and Individuals Who Carry on Business Within the Territory* (1917) 30 HARV. L. REV. 676, 689. The maxim that every one is presumed to know the law, means that the law is applicable to him whether or not he knows the law in fact. So here, the implication of consent means, not that the foreign corporation actually consents, but that service upon the corporate agent gives jurisdiction whether or not it has in fact consented.

The commonest type of statute forbids the doing of business in the state before the filing of a written consent to the jurisdiction of the state courts.

It is impossible to state any general rule as to what constitutes the doing of business, for the purpose of jurisdiction. The maintenance of an office with an agent to solicit business and authorized to receive payments for specified purposes seems to be sufficient.⁶ A foreign corporation owning property in the state but doing no business there is not subject to service of summons unless the property is attached.⁷ Isolated business visits by corporate officers do not, in themselves, constitute a doing of business within the state.⁸ It is always a question of

Such statutes usually require the designation of one or more parties on whom process may be served. Others provide that the service on a foreign corporation may be made in the same manner as upon a domestic corporation. A few states seem to have no special provision at all. But then it seems that a foreign corporation doing business in the state may be served in the way provided for domestic corporations. Cahill, *op. cit. supra*, at p. 690. That the corporation must be doing business within the state, see *International Harvester Co. v. Kentucky* (1914) 234 U. S. 579, 34 Sup. Ct. 944; (1922) 35 HARV. L. REV. 87. The process will be valid only if served upon some authorized agent. *Philadelphia & R. Ry. v. McKibbin* (1917) 243 U. S. 264, 37 Sup. Ct. 280; (1922) 31 YALE LAW JOURNAL, 205.

⁶ *International Harvester Co. v. Kentucky*, *supra* note 5. Otherwise if the agent has no authority to receive payments. *Green v. Chicago, B. & Q. Ry.* (1907) 205 U. S. 530, 27 Sup. Ct. 595. It has been held that it is not enough for a foreign corporation to authorize a domestic concern to sell tickets at a commission for passage on its ships. *Goepfert v. Compagnie Générale* (1907, E. D. Pa.) 156 Fed. 196. *Commercial Accident Co. v. Davis* (1909) 213 U. S. 245, 29 Sup. Ct. 445, seems to hold that a state statute may prescribe what agent may be served, if the corporation is doing business within the state. A judgment against non-resident individuals though members of a partnership doing business in the state, on service of summons on their agent in charge of the business, is void for want of due process. As citizens of one state, unlike a foreign corporation, cannot be prohibited from doing business in another state, they do not consent to be bound by the prescribed service of that state. *Flexner v. Farson* (1919) 248 U. S. 289, 39 Sup. Ct. 97.

⁷ See *Caledonian Coal Co. v. Baker* (1905) 196 U. S. 432, 25 Sup. Ct. 375. Where property of the corporation was attached in New York and service was made upon the officer temporarily within the state, there was held to be no jurisdiction. *Brandow v. Murray* (1922, 1st Dept.) 203 App. Div. 47, 196 N. Y. Supp. 293.

⁸ *Riverside Mills v. Menefee* (1915) 237 U. S. 189, 35 Sup. Ct. 579; see *Hoyt v. Ogden Cement Co.* (1911, C. C. N. D. N. Y.) 185 Fed. 889, 899; *Bagdon v. Phila. & Reading C. & I. Co.* (1916) 217 N. Y. 432, 111 N. E. 1075; *Dollar Co. v. Canadian C. & F. Co.* (1917) 220 N. Y. 270, 115 N. E. 711; Beale, *op. cit. supra* note 4, sec. 270. The earlier New York decisions followed a contrary ruling. *Pope v. Terre Haute Car & Mfg. Co.* (1881) 87 N. Y. 137. Even where an agent of a foreign corporation comes into the state to represent his company with reference to the subject matter of the suit, it has been said that it does not of itself constitute a doing of business. *Commercial Mutual Accident Co. v. Davis*, *supra* note 6. But the *dictum* has not been followed in *Premo Specialty Mfg. Co. v. Jersey Creme Co.* (1912, C. C. A. 9th) 200 Fed. 352. In other jurisdictions the *dictum* is followed where the contract was executed in a state other than the state of suit. *Louden Mfg. Co. v. American Malleable Iron Co.* (1904, C. C. S. D. Iowa) 127 Fed. 1008; see *Painter v. Colorado*

fact for each case,⁹ and the United States Supreme Court has the final word.¹⁰

In considering the development of this problem in the United States, it is not so much a question of what jurisdiction has been conferred upon the courts; that is entirely statutory. The important thing is to determine what jurisdiction can be conferred under accepted constitutional limitations.¹¹ It has been contended that service upon an officer of a foreign corporation within the jurisdiction is sufficient to make the corporation amenable to the courts of that jurisdiction, even though the corporation did no business or owned no property within the state. Some courts even asserted that while this was good service of process under the due process clause of the fourteenth amendment, a personal judgment issued upon it would not be such a judgment as other states would recognize under the full faith and credit clause of the constitution.¹² Following this ruling literally, it would be possible to commence an action against a foreign corporation upon any service which would be sufficient as against a domestic corporation, and a judgment so secured would be valid for every purpose within the state of suit. Whether the foreign corporation was doing business or had property in the state would be immaterial as to the validity of the judgment there.¹³

This distinction between the operation and effect of the due process clause of the fourteenth amendment and the full faith and credit clause has been expressly overruled by a federal Supreme Court case holding that the courts of one state may not without a violation of the due process clause render a judgment against a foreign corporation where it has not come into the state for the purpose of doing business, has no property

Springs & C. C. D. R. Co. (1907) 127 Mo. App. 248, 104 S. W. 1139; 43 L. R. A. (N. S.) 1015, note; 10 L. R. A. (N. S.) 693, note; 24 L. R. A. 289, note.

⁹ See *People's Tobacco Co. v. American Tobacco Co.* (1918) 246 U. S. 79, 87, 38 Sup. Ct. 233, 235.

¹⁰ *Dollar Co. v. Canadian C. & F. Co.*, *supra* note 8; (1922) 22 Col. L. Rev. 83. In recognition of this principle courts have gone so far as to interpret a statute authorizing, without qualification, service of process upon a foreign corporation as meaning service of process upon only those foreign corporations which are doing business within the state. *Wisconsin Cattle Co. v. Oregon Short Line R. R.* (1908) 105 Minn. 198, 117 N. W. 391; (1917) 1 MINN. L. REV. 192. Activities in a state insufficient to make it take out a license may be sufficient to render it amenable to process. *International Text Book Co. v. Tone* (1917) 220 N. Y. 313, 115 N. E. 914. And, while a corporation doing an exclusive interstate business in a foreign jurisdiction may not be required to procure a license as a condition precedent to the privilege to do such business, it may through its servants be subject to service of process. *Tauza v. Susquehanna Coal Co.* (1917) 220 N. Y. 259, 115 N. E. 915.

¹¹ Cahill, *op. cit.* *supra* note 5.

¹² *Menefee v. Riverside Cotton Mills* (1912) 161 N. C. 164, 76 S. E. 741; *cf.* *Cunningham v. Express Co.* (1872) 67 N. C. 425; *Whitehurst v. Kerr* (1910) 153 N. C. 76, 68 S. E. 913.

¹³ This seems to have been the actual contention made by early New York cases. *Pope v. Terre Haute Car & Mfg. Co.*, *supra* note 8.

therein, and has no qualified agent upon whom process may be served.¹⁴ But the court has developed another distinction between service upon a voluntary and an involuntary agent of a corporation. Where an agent is appointed for the service of process in accordance with a state statute, it gives the state jurisdiction for actions arising not only within that state but in any foreign jurisdiction.¹⁵ But where no agent is appointed and service has to be made on a person named by the statute, usually the secretary of state, the jurisdiction of the state is restricted to causes arising within the state.¹⁶ The reasons for this distinction is not made clear by the decisions.

The recent case of *Davis v. Farmers Coöperative Equity* (1923, U.S.) 43 Sup. Ct. 556 indicates that there is another limitation on the power of the states. A Minnesota statute providing that "any foreign corporation having an agent in this state for the solicitation of freight or passenger traffic or either thereof over its lines outside of this state, may be served with summons by delivering a copy thereof to such agent" was held unconstitutional as to any controversy arising outside the state on the ground that it was an unreasonable burden upon interstate commerce. It seems then that the federal supreme court has fixed arbitrary and definite limits to a state's power respecting service upon foreign corporations.

¹⁴ *Riverside Mills v. Menefee*, *supra* note 8.

¹⁵ *Bagdon v. Phila. & Reading C. & I. Co.*, *supra* note 8; *Pa. Fire Ins. Co. v. Gold Issue M. & M. Co.* (1917) 243 U. S. 93, 37 Sup. Ct. 344; *Johnston v. Trade Ins. Co.* (1882) 132 Mass. 432.

¹⁶ *Old Wayne Life Ass. v. McDonough* (1907) 204 U. S. 8, 27 Sup. Ct. 236; *Simon v. Southern Ry.* (1914) 236 U. S. 115, 35 Sup. Ct. 255.